Supreme Court of the United States

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IN THE

Supreme Court of the United States

October term, 1960

No.

FANDERLIK-LOCKE CO., a corporation, and GREAT AMERICAN INDEMNITY COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA, for the use of M. B. Morgan, doing business, as M. B. MORGAN PAINTING CONTRACTOR; and NEW AMSTERDAM CASUALTY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on November 30, 1960 (rehearing denied December 31, 1960), affirming the judgment of the United States District Court for the District of New Mexico.

OPINIONS BELOW

The opinions* of the Tenth Circuit have not been reported, but are reproduced in Appendix A and B to this Petition.

JURISDICTION

The judgment of the Tenth Circuit was entered on November 30, 1960. Petitioners' plea for a rehearing en banc was denied December 31, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1)[1].

QUESTIONS PRESENTED

1. Is the subcontractor's primary remedy *administrative* or *judicial* in a dispute involving the Government, the prime and the subcontractor for extras arising out of a Government construction contract when the Government denies any obligation to reimburse the prime for the work.

The law requires first the exhaustion of the administrative remedy.

2. Does the Miller Act[2] prevent the administrative consideration of a question involving the Government, the prime contractor and the subcontractor between the three, whether the work was "extra" or "corrective."

The contractor agreed to employ the administrative procedure, the only forum wherein the Government, an indispensable party, was present.

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* The Court of Appeals' original opinion was entered May 2, 1960. Upon rehearing this was withdrawn and the present opinion was filed November 30, 1960.

[1] 62 Stat. 928 (1948).

[2] 49 Stat. 793 (1935), 40 U.S.C. 270a-270e.

STATUTES

Those portions of the Miller Act, 49 Stat. 793 (1935), 40 U.S.C. 270a-270e, and of the Act of May 11, 1954, 68 Stat. 81 (1954) 41 U.S.C. 321-322 (the finality statute) pertinent to this appeal are set out in Appendix D, infra.

STATEMENT OF THE CASE

A subcontractor, along with his surety, sued his prime contractor and its bonding company under the Miller Act in the federal district court for extras and additions arising out of the job. The district court gave him judgment for $110,713.60. The Court of Appeals affirmed by a divided court after withdrawing its original opinion which had vacated the judgment.

The use plaintiff is Morgan, a painting subcontractor under a construction contract for military housing at a New Mexico Air Force base. In this Court the subcontractor, together with his bonding company, are the respondents.

Morgan's prime contractor, Fanderlik-Locke Co., along with its bonding company, defendants below, are the petitioners here.[3] The prime contractor's agreement with the Government was to construct some 175 dwelling units at the air base for the stipulated sum of $2,173,035.00; the subcontractor, in turn, agreed to paint them for $63,630.00.

The contracts were executed in 1955 and performance completed in 1956. There was probably more than the usual amount of bickering between the subcontractor and his prime, and soon after the conclusion of the work, the prime contractor filed a claim, *on behalf of the subcontractor*, with the Air Force Contracting Officer

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[3] For clarity, throughout this Petition, the parties will be referred to as the "subcontractor" and the "prime contractor." The surety companies involved seek no independent rights.

which included all matters in litigation here. The claim was denied. An appeal, likewise in the name of the subcontractor, was taken to the Armed Services Board of Contracts Appeals where it remains today, stagnant and undetermined, pending the final determination of the federal court litigation.

His claim being denied by the administrative forum he affirmatively selected, the Contracting Officer, the subcontractor then instituted an action in the District Court of New Mexico alleging jurisdiction under the Miller Act. The resulting judgment in his favor was an unusually troublesome problem to the Court of Appeals. After first declaring that the judgment should be stayed, pending completion of the administrative procedure, it withdrew this opinion upon rehearing, and affirmed the district court, one of the three judges dissenting. The present dissent is identical to the first opinion of the Court, and substantially expresses petitioners' argument here.

The contract documents:

The prime contract[1] with the Government was in standard form and contained the customary "Disputes Clause":

"6. Disputes

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the head of the department, and the decision of the head of the department or his duly authorized representatives for the hearings of

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[1] The prime contract was Plaintiffs' Exhibit A, and the subcontract plaintiffs' Exhibit B. The original exhibits were filed in the Court of Appeals in lieu of reproducing them in the Record.

such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; Provided that, if no such appeal to the head of the department is taken, the decision of the Contracting Officer shall be final and conclusive . . ."

The subcontract did not expressly contain a disputes clause, but did recite:

> Section 23. The Contractor and the Subcontractor agree to be bound by the terms of this Agreement, the A.I.A. General Conditions attached, the drawings and specifications attached as far as apprehensible to this sub-contract and also by the following provisions:
>
> The Sub-contractor agrees—
>
> (a) To be bound to the Contractor by the terms of the Agreement, General Conditions, Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the Owner.[5]
>
> * * * *
>
> "Art: 37. Relations of Contractor and Subcontractor . . .
>
> The Contractor agrees to bind every Subcontractor and every Subcontractor agrees to be bound by the terms of the Agreement, the General Conditions, the Drawings, and Specifications as far as applicable to his work, including the following provisions of this article, unless specifically noted to the contrary in a subcontract approved in writing as adequate by the Owner or Architect.
>
> This does not apply to minor subcontracts.

[5] The "Owner" is the Government.

The Subcontractor agrees —

> (a) To be bound to the Contractor by the terms of the Agreement, General Conditions, Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he by those documents, assumed toward the Owner."

The position of the parties:

The prime contractor's argument is that Morgan must exhaust the administrative remedy he initiated prior to seeking judicial relief for the same claim, a claim that he was required to do "extra work." He contracted to do so.

The subcontractor's attitude throughout was that the Miller Act was always available to him irrespective of the administrative remedy.

The Court of Appeals held:

In its first unanimous decision, that Court *stayed* the judgment of the district court, pending the completion of the administrative process, reasoning largely that under the law of contracts the subcontractor had so agreed.

In its second, divided opinion, now the Opinion of the Court, it affirmed the judgment of the district court by a contrary interpretation of the written agreements, to the effect that the subcontractor had not so bargained away his Miller Act remedy.

The effect of the Court of Appeals decision:

We do not burden this Court with — or seek a review upon — the "merits" of the claim for extras. That matter has been litigated and reviewed. However unfortunate may be the result to petitioners, it is not, nor should it be, the sole grounds for certiorari. But this Petition is no intellectual exercise. We do point out, as deserving of attention by the Court, that the original painting subcontract was in the amount of $63,630.00; that if the judgment is

affirmed, the subcontractor will receive the staggering amount of $165,000.00[6] for painting the identical number of units as originally specified. Nothing more was painted, the *same* units were only painted again and again. The Courts below agree with the subcontractor that all this was was extra work. The prime contractor considered this extra painting was necessary *to correct defective work*. The Government agrees. Faulty workmanship and mistakes are not extras.

The impact of the decision below is that the prime contractor must pay out about $110,000.00 more to the painter than the original contract provided, although it has not yet received, nor has it any assurance of ever obtaining, one penny more than its original contract sum from the Government.

We thus have the courts determining a fact question one way while the administrative agency determines it another. The prime contractor, imprisoned in the middle, is squeezed to the extent of approximately $110,000.00. Yet at no time was it other than a mere conduit for the Government's orders to the subcontractor to paint, and paint again.

The first opinion of the Court of Appeals would have completely resolved this inequitable inconsistency by declaring a stay. Such a stay would have permitted the district court to observe, and possibly profit from, an administrative determination as to whether the bills of the subcontractor represented extra work, or whether they only represented corrective work which his existing contract required him to perform.

If "extras," then they became the obligation of the Government, since they would symbolize additional benefits received. These are questions of fact.

Unless this Court will do surgery on this monster, it remains with two heads.

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[6] During the job and prior to any claim for extras, Morgan had been paid $53,371.00.

REASONS FOR ALLOWANCE OF THE WRIT

"On the other hand a case before this Court is not just a case. Inevitably its disposition carries implications and gives directions beyond its particular facts."

Frankfurter, J. concurring in *Smith v. California*, 361 U.S. 147, 162. (1959).

1. This Petition presents an original problem to this Court, though we submit that the position advocated by the petitioners is the reasonable and logical descendant of *United States v. Blair*, 321 U.S. 730 (1944); *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234 (1946), and *United States v. Callahan Walker Construction Co.*, 317 U.S. 56 (1942), to-wit: that a governmental subcontractor, once having commenced, should exhaust the administrative procedure before the Armed Services Board of Contract Appeals as to questions of fact before going to court. The Court of Appeals has diverted sharply from the law and the logic as expressed by the Supreme Court of the United States. We seek more respect for its decisions.

2. Governmental procurement, including construction, and even more specifically, defense construction, is without doubt the biggest business in this nation, and very probably in the world. The effect of this Court's consideration will have consequences upon, and give directions to, this gigantic industry far and beyond the rights and obligations of the litigants immediately concerned.

3. The decision of the Court of Appeals:

(a) Appears contrary to the intent of the Congress, abjures the "finality statute,"[7] and renders uncertain jurisdiction of the Armed Services Board of Contract Appeals.

(b) Violates a doctrine of this Court, which was considered "the long settled rule" in *Myers v. Bethlehem Ship-*

[7] 68 Stat. 81 (1954), 41 U.S.C. 321-322.

building Corp., 303 U.S. 41, 50 (1938), that the courts should keep hands off, or at least be tolerant of, the administrative process.

> ". . . it is important to remember that courts and administrative agencies are collaborative 'instrumentalities of justice' and not business rivals."
>
> *United States v. Ruzicka*, 329 U.S. 287, 295 (1946).

(c) Appears contrary to fundamental principles governing the interpretation of contracts.

(d) Leaves the Tenth Circuit in a position which seems diametrically opposed to that of other circuits.

(e) Leaves the prime contractor:

". . . between the rock and the whirlpool."[8]

The granting of this petition is in the public interest.

ARGUMENT AMPLIFYING THE REASONS STATED ABOVE

I.

THE ADMINISTRATIVE REMEDY

We seek review by this Court in order that the Miller Act as erroneously interpreted by the court below, will not blot out the manifest destiny of the standard "Disputes Clause" in Government construction contracts.

The Government bargains and pays for the "Disputes Clause." In turn the prime contractor, with his agreement with the Government tucked under his arm, deals with his subcontractors. Many provisions of a prime contract are always incorporated into that

[8] "He [the contractor] was between the rock and the whirlpool." *Stafford v. United States*, 74 F. Supp. 155, 162, (Ct. Cl. 1947).

later agreement. It was done in this case. Morgan had ample warning of what he was signing. He was no pick and shovel laborer.[9]

The Miller Act is an expression of the Congress that payment of the bills of subcontractors on public works projects should be guaranteed by a surety bond taken out on their behalf by the prime contractor. It is essentially a *protection* statute.[10] It permits subcontractors to institute an action in the district court against the prime contractor and its surety to enforce the payment of their just bills. Since a sovereign's property is immune from the ordinary mechanics' lien, *Armstrong v. United States*, 364 U.S. 40 (1960), the Miller Act substitutes a bonding company. It is essentially a lien statute. The Miller Act establishes the foreclosure procedure.

Certainly it may be recognized at the outset that the overwhelming percentage of subcontractors on public works are paid as a matter of course without resort to litigation.

Secondly, the Miller Act itself provides no distinctive procedure tailored specifically to the settlement of quarrels arising out of such contracts. The ordinary foreclosure action almost presupposes the validity of the promissory note.

Essentially the purpose of the Miller Act is two-fold: primarily to insure payment to the subcontractor of the amounts due him, and to handle disputes of law, e.g., *United States v. Clifford H. MacEvoy*, 322 U.S. 102 (1944), where there remains no question of the sum due, as between the contractor and his subcontractor. It, too, can adjust these amounts when the Government is not a party to the quarrel, or when its pecuniary interests are not so vitally affected as in this present litigation.

We have here, in reality, a dispute between a subcontractor and the Government.

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[9] Morgan testified that he had some 30 years' experience as a painting contractor, and prior to that had been a painter himself for 13 years. (R. 7-8).

[10] Extracts from Congressional committees and debates establishing this assertion are included in Appendix C infra.

For almost the hundred years since the conclusion of the Civil War, there has existed a suitable procedure whereby such disputes, between prime contractors, sub-contractors, *and the Government*, can be properly determined, with all parties having their say. This mechanism is inherent in the Disputes Clause. It antedates the Miller Act.

The particular clause involved in the matter presently before the Court has been set out in full above.

Thus, involved here is the whole problem of government procurement, and, in particular, construction by the Department of Defense. Subcontractors' liens and defense constructions are two problems that should be analyzed from separate views; however, they may be inter-related to an extent. We again ask this Court to observe that this Petition seeks a review of problems far beyond the mere rights of the parties.

Today defense construction has one major objective — get the job done. The phrase "defense lag" or "missile gap" is a source of national concern.[11] The myriad of disputes which arise between the contracting parties has been one of the industry's plagues. Commonly these are of a technical nature involving the caliber of the work of the various crafts, the specifications, changes, extras, types of material, and the like. All of these problems were involved in this case. Why didn't the paint stay on the houses, whose fault was it that it didn't, and who has to pay for the loss — in a painting subcontract in which the originally contract price ballooned from some $60,000.00 to $165,000.00, though nothing more was painted than originally specified.

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[11] President Kennedy's Message on the State of the Union, January 30, 1961. "Each day the crises multiply. Each day their solution grows more difficult. Each day we draw nearer the hour of maximum danger, as weapons spread and hostile forces grow stronger —

— the tide of events has been running out and *time has not been our friend*."

N. Y. *Times*, January 31, 1961.

Such disputes clog the courts,[12] but of more pressing national concern, they cause delays. Absent the litigation involved here, Morgan would have had a final administrative determination, of his right to extras, years ago.

The application of the Disputes Clause to the present and similar litigation is not only reasonable, it was designed for such exact situations.

The present clause is standardized in Defense Department Procurement Regulations. Any contractor whose business is in the field of government construction has had knowledge of it for years.

Legally, this Court has consistently upheld it, or its ancestors, since *Kihlberg* v. *United States*, 97 U.S. 398 (1878).

The object of the clause has been stated by this Court to be:

> It creates a mechanism whereby adjustments may be made and errors corrected on an administrative level, thereby permitting the government to mitigate or avoid large damage claims that might otherwise be created. . . . This mechanism moreover is exclusive in nature. Solely through its operation may claims be made and adjudicated as to matters arising under the contract.
>
> *United States* v. *Joseph A. Holpuch Co.*, 328 U.S. 234, 239-40 (1946).

For a long time the failure to exhaust this remedy has been held fatal to the prime contractor. *United States* v. *Callahan Walker Co.*, supra. *United States* v. *Blair*, supra. By 1951 in *United States* v. *Wunderlich*, 342 U.S. 98, the administrative decision had become final, absent fraud. The Congress then extended the scope of judicial review largely by the addition of the "substantial evidence" requirement. This act,[13] generally known as the Wunderlich Act or the "finality statute," has never been construed by this Court.

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[12] A Bill presently before the Congress adds 63 Federal judges. H.R. 8, 83d Cong., 1st Sess. (1953); 41 U.S.C. Sec. 321, 322.

For the purposes of this Petition, this Court over a long unbroken period has approved the Disputes Clause, as a practical, speedy, and relatively inexpensive procedure for resolving disputes. The only quarrel within the Court (Wunderlich was a 6-3 decision) has been over the extent of judicial review. At no time has this Court ever shown any distaste for the Dispute Clause itself, or its administrative procedure. It was well aged at the time of the "New Deal," and its origin even antedates the Interstate Commerce Commission. The procedure has a well defined and classic shape. No contractor flounders here.

Nor has the Congress ever shown a contrary disposition.

While the Civil War cases adjudicated disputes born by that conflict, and various boards arose during and after the first World War, the modern machinery is an outgrowth of the tremendous procurement necessitated by World War II ("the arsenal of democracy") and its aftermath, the "cold war."

The War Department Board of Contract Appeals, known as WDBCA, was set up August 8, 1942. These, and boards of other Services, were combined in the Armed Services Board of Contract Appeals — ASBCA — in 1949. It is the present designate of the Service Secretaries to decide those "disputes" which are appealed from the Contracting Officer on defense jobs. A dissatisfied party may then obtain review in the Court of Claims.

The Board has been busy. It now averages several hundred written opinions per year. We can assume it is most familiar with defense procurement, particularly construction matters. It is truly an expert body. It relieves a tremendous burden from the district courts and the Court of Claims. It avoids the lags and tightens the gaps.

Why, therefore, should it be restrained, as the Court of Appeals would have it, from settling disputes involving subcontractors, particularly claims for extras? The greater part of all construc-

tion contracts are subcontracted, with estimates varying from 57% to 80%. The Court of Appeals' decision would nullify the applause of this Court for that procedure. Clearly it would be a backward step at a time when peacetime defense procurement reaches astronomical dollar figures. The Court of Appeals decision could bury the national welfare in the files of the district courts.

The defense subcontractor has come of age and it is time for him to behave like an adult. If 100,000 sub-contractors are required in the aircraft industry alone, if each receives encouragement from the Congress in the form of the Small Business Administration, if each would accept the favor of the Defense Department, it is time that each recognize that he bargained for his disputes to be resolved by the Board.

Of course, legally there is no bar to the resolution of these disputes administratively. Since *United States* v. *Blair* (supra), the technicality of no privity between the subcontractor and the Government has been easily mastered by allowing all appeals to the Board to be prosecuted in the name of the prime contractor.[14] They have been consistently adjudicated in this fashion, just as Miller Act cases are brought in the name of the United States. The Board and the reviewing courts have welcomed them. The appeal to the Board was so fashioned in this case.

But, the Court of Appeals raises the barrier that such was not the agreement of the parties because the Disputes Clause was not physically present in the subcontract.

We submit that the Court of Appeals, in tossing this monkey wrench into the well recognized procedure of resolving disputes, has turned back the clock of judicial procedural progress in an area vital to the national interest.

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[14] The parties apparently are satisfied there. Very few appeals are taken to the Court of Claims.

II.

THE INTERPRETATION OF THE CONTRACTS

A proper analysis of the contract agreements will evidence merit in this Petition. Justice Day, almost half a century ago, commented upon a Governmental construction contract,

> A government contract should be interpreted as are contracts between individuals, with a view as to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument.

Holkerbach v. United States, 233 U.S. 165, 171-172 (1914).

We ask the Court's attention to an even earlier admonition from Justice Field in *Noonan v. Bradley*, 76 U.S. (9 Wall.) 394, (1870):

> . . . when an instrument is susceptible of two constructions — the one working injustice and the other consistent with the right of the case — that one should be favored which standeth with the right.

We believe Justice Field would have frowned upon the interpretation advanced by the Court of Appeals, and, particularly, its effect upon the Petitioners. We have referred to it as the squeeze. He would call it "the one working injustice."

Our construction "standeth with the right." By it everyone is protected, no one hurt, and the facts all resolved in one forum. We seek the single forum. And we submit that the administrative forum is not only the proper and logical one, but it is the one actually selected by the parties to this lawsuit before their quarrel erupted into court.

Nor is our construction of the documents a difficult one, requiring intellectual gymnastics. It has generous support in the authorities.

Professor Williston says:

> Where a writing refers to another document that other document, or so much of it as is referred to, is to be interpreted as part of the writing.

3 Williston Contracts Sec. 628, p. 1801 (Rev. Ed.). His note to this assertion contains thirty-three cases.

Professor Corbin, in referring specifically to business transactions, says

> Any business transaction in which a contract is made consists of a good many communications and other actions. . . . The terms finally agreed on may be fully and accurately "integrated" in a single paper document, one that certainly is not to be torn apart in the process of interpretation. In many cases, however, the terms of agreement may be expressed in two or more separate documents, some of them containing promises and statements as to their agreed consideration, and others, such as deeds, mortgages and trust indentures, being performances agreed on rather than a statement of terms to be performed. In every such case, these documents should be interpreted together, each one assisting in determining the meaning intended to be expressed by the others.

3 Corbin Contracts Sec. 549, pp. 101-02 (1951).

New Mexico, since early Territorial days, has applied this rule to quarrels between sub-contractors and their primes.

> In short we are of the opinion that the two contracts were so connected, and the one so dependent upon the other, that they formed one entire contract. . . .

Price v. Garland, 3 N.M. (Gild.) 505, 511, 6 Pac. 472 (1885).

This Court seems to think that the forest should not be obscured by the trees.

> The intention of the parties is to be gathered, not from the single sentence above quoted, but from the whole instrument, read in the light of the circumstances existing at the time of negotiations leading up to its execution.

Miller v. Robertson, 266 U.S. 243, 251 (1924).

There are many cases. We quote from a very few involving "public contracts."[15]

> The subcontract incorporated by reference the terms of the prime contract entered into between plaintiff [the prime contractor] and the State of Oregon.

Maerz v. J-C Company, Or , 355 P.2d 94 (1960).

> It is clear, too, that by virtue of the incorporation by reference of the contract into the bond, and of the other documents into the contract, the bond and all documents are to be read and construed together. . . .

Kirby v. Board of Ed. of Cecil County, 210 Md. 383, 123 A.2d 606 (1956).

> The rule is stated in *Bell v. Rio Grande Oil Co.*, 23 Cal. App. 2d 436, 440, 73 P.2d 662, 663: 'A written agreement may, by reference expressly made thereto, incorporate other written agreements; and in the event such incorporation is made, the original agreement and those referred to must be considered and construed as one.

Holbrook v. Fazio, 191 P.2d 123 (Cal. 1948).

Incorporating the "Disputes Clause" into the subcontract at least puts the fighters into one arena, the Board of Contract Appeals, for a preliminary determination of the facts.

But there is an even more pertinent rule of contract construction: actions sometimes speak louder than words. If there be an

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[15] The Court acknowledged this rule of construction in *Guerini Stone Co. v. P. J. Carlin Const. Co.*, 240 U.S. 264 (1916) where the wording of the "reference clause" was limited.

ambiguity, if the mere reading of the documents still leaves a doubt, then it is reasonable to consider what the parties did, how they acted, what their own apparent understanding was.

They appealed to the Board. Both of them started on the same horse, before Morgan jumped off in the stream. This start was a voluntary act on his part.

Professor Corbin:

> Even though the parties have expressed an agreement in terms so vague and indefinite as to be incapable of interpretation with a reasonable degree of certainty, they may cure this defect by their subsequent conduct and by their own practical interpretations.

1 Corbin CONTRACTS Sec. 101, p. 319.

New Mexico concurs:

> Where an instrument is ambiguous the construction of the parties will govern.

Maffett v. Emmons, 52 N.M. 115, 192 P.2d 557 (1948).

All these disputes related to the painting. It is the essence of a subcontract that as to the portion of the work to which it applies, it contains the obligations of the prime contractor. Pause for a moment to consider the alternative interpretation of the Court of Appeals. As a practical matter, we end in a "verbal farrago,"[16] a swamp. This is essentially a dispute between the Government and the sub-contractor over the *performance* of the paint job. Fanderlik-Locke Co. is not a painter. Morgan is — and was the painter on the job. To decide a dispute over the paint, in the absence of the painter, does not make sense, particularly when a procedure is so readily available — and workable — to have the painter present. Under the Miller Act, the Government, surely the most important party to this contract, is not present, nor is there under that statute

[16] The phrase is Learned Hands', 246 F.2d, "Fifty Years of Federal Judicial Service," p. 11.

any way to force its presence. At the administrative level all parties are present. Ergo the dispute is possible of rational decision. The right of judicial review survives. Our law abhors the determination of rights and duties *in absentia*.

The last time this Court construed the Miller Act was *Sherman v. Carter*, 353 U.S. 210 (1957), wherein in holding in favor of the trustees of the union welfare fund it laid great emphasis on the third party beneficiary rule. Should not Morgan here observe a similar *obligation*; even if no reference clause existed at all? He sought advantage of the Dispute Clause. It should not be construed as a one-way street.

As a summary to our argument here, there is no better statement than that by the Fifth Circuit in *United States v. Bruce*, 272 F.2d 62, 64 (1959):

> Of course incorporation of the prime contract into the subcontract cuts both ways. Its obvious purpose commits the subcontractor, as well as the prime contractor, to the typical government clause giving finality to the Contracting Officer's decision on contract performance, compliance or breach.

And by this Court in *United States v. Moorman*, 338 U.S. 457 (1950):

> "Nor should such an agreement of parties be frustrated by judicial 'interpretation' of contracts. If parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlements of disputes, this deprivation should come from the legislative branch of Government."

It never has.

III.

THE SPLIT IN THE CIRCUITS

United States v. Bruce, supra, was an action by a subcontractor against its prime arising out of the construction of a

Veteran's Hospital in Florida. It was brought under the Miller Act. The basic quarrel was whether 78 doors supplied and installed by the subcontractor were so defective as to permit the prime contractor, when sued, to make a charge back against his sub. The Contracting Officer said they were defective; an administrative appeal was taken by the prime on behalf of its sub, which appeal had not been determined at the time of the Miller Act litigation. Certainly the situation was similar to that here. The Court of Appeals for the Fifth Circuit held that whether or not the doors were defective "was a determination left to the contracting officer whose decision had not yet been overruled by an administrative appeal." The Court then, with equity and logic, stated that in the event that the prime contractor, Bruce, did recover in the administrative process, he would hold such funds as a trustee for the subcontractor.

Of course Fanderlik-Locke would accept any such solution, or obligation, here.

This decision of the Fifth Circuit cannot be reconciled with that of the court below.

That same circuit in an earlier decision, *United States* v. *George*, 243 F.2d 83 (1957), gives a strong hint that in a Miller Act quarrel between a prime contractor and its sub over extras arising out of a Corps of Engineers contract, the administrative decision would be final:

> . . . and Kilsby [the subcontractor] at best under equitable principles of subrogation or otherwise can require George [the prime contractor] to present and prosecute the claims under his prime contract with the Government, in which event the dispute of these two claims must be settled in the manner provided by General Provisions 6 [the dispute clause] of the prime contract.

For its authority the Fifth Circuit cited *United States* v. *Blair*, supra.

The Second Circuit in *United States v. Morley Const. Co.*, 98 F.2d 781 (1938), a suit under the Heard Act, the predecessor of the Miller Act, indicates that in a dispute between a sub and a prime contractor arising out of the construction of a Veteran's Administration Hospital the sub would be bound by the contracting officer's decisions, as to questions of fact.

The Fourth Circuit, again in a Miller Act dispute between a prime contractor and its sub for the construction of an army camp, said:

> The contract also provided that all disputes arising under the contract should be decided by the contracting officer and his provisions of this kind are binding upon the parties; . . . .
>
> Our attention is called to the established rule that contract provisions of this kind are binding upon the parties; . . . ."

Ross Engineering Co. v. Pace, 153 F.2d 35 (1946). *Callahan Walker*, supra, and *Blair*, supra, were cited. The court held that under the peculiar facts of the case the parties had agreed otherwise to have the contracting officer's decision enforced:

> We recognize the force of the general rule that agreements to abide by the decision of a contracting officer are binding but we hold that under the present circumstances it was the intention of M.B.S. and A.R.M. with respect to the compensation to be paid for laying the stone base in the event that unsuitable material should be encountered, that the actual conditions rather than the judgment of the contracting officer of the United States should govern. This arrangement in no way interfered with the interests of the United States or of the right of the contracting officer to pass on the sufficiency of the performance. (P. 41)

The Eighth Circuit said, in a Miller Act dispute over "extras" between a sub-contractor and its prime arising from the construction of a Government medical center:

> We are convinced that a determination of requirements of the specifications regarding brick and mortar courses was in the first instance a question for the contracting officer, subject to review for fraud or unfairness, *Merrill-Ruckgaber Co. v. United States*, 241 U.S. 387, 36 S. Ct. 662, 60 L. Ed. 1058. . . .

United States v. Henke Construction Co., 157 F.2d 13, 19, 1946).

The position of the Court of Appeals, Tenth Circuit, appears to be the minority one. The issues involved are adequately presented by the Record in this case. Their final determination by this Court at the instance of this Petition would appear timely and in the public interest.

CONCLUSIONS

A distinguished scholar — and a very fascinating, if sometimes puzzling author — presents the case that practically any run-of-the-mine appellate practitioner can make out a reasonably sound technical argument to support his client's position, whatever may be the merits.[17]

We hope there is a great deal more than that in favor of this Petition. Whatever may be the technicalities of "privity," "incorporation by reference," the "exhaustion doctrine" and the like, no one can miss the fact that Government procurement, at this crucial time in our nation's history, necessitates clear understanding by those who construct and supply for the Government; haste on the part of all parties to the contract; with prompt and proper performance.

The achievement of the national welfare demands harmony, in a world which, internationally, so blatantly lacks it.

Disputes in defense construction jobs are inevitable. Their proper and speedy disposition can be facilitated by a direction from

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[17] Karl N. Llewellyn, "The Common Law Tradition — Deciding Appeals," Little Brown & Co., 1960.

this Court. Such a direction will encourage and strengthen the existing system in this country, in which private business constructs the country's public buildings.

For the foregoing reasons, it is respectfully submitted that this Petition should be granted.

W. Peter McAfee
Counsel for Petitioners.

420 Marquette N.W.
Albuquerque, New Mexico

James R. Toulouse,
David R. Gallagher,

420 Marquette N.W.
Albuquerque, New Mexico

Of Counsel.

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 6144 — November Term, 1960

FANDERLIK-LOCKE CO., a corporation, and GREAT AMERICAN INDEMITY COMPANY, a corporation,

Appellants,

v.

UNITED STATES OF AMERICA, for the use of M. B. Morgan, doing business as M. B. MORGAN, PAINTING CONTRACTOR; and NEW AMSTERDAM CASUALTY COMPANY,

Appellees.

Appeal from the United States District Court for the District of New Mexico

DAVID R. GALLAGHER, of the firm of McAtee, Toulouse, Marchiondo, Ruud & Gallagher, Albuquerque, New Mexico, for *Appellants.*

W. A. SLOAN, of the firm of Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, New Mexico, and JOHN P. EASTHAM, Albuquerque, New Mexico, for *Appellees.*

Before BRATTON, HUXMAN and PICKETT, *Circuit Judges.*

PICKETT, *Circuit Judge.*

Filed, United States Court of Appeals, Tenth Circuit, November 30, 1960.

ROBERT S. CARTWRIGHT, *Clerk.*

This is a Miller Act case, 40 U.S.C.A. §270a, et. seq., in which a subcontractor[1] seeks to recover, from a prime contractor and its bondsman, the value of labor performed and materials installed in addition to that provided for in the subcontract. It was alleged that, during the performance of the subcontract, required labor and materials were furnished, together with extras and additional work, at the request of the prime contractor, to the aggregate amount of $183,259.20; that the subcontractor had received $53,371.00; and that the balance due was $129,888.20. The court found that there was due and owing to the subcontractor the sum of $110,713.60, for the performance of the subcontract and for additions and extras furnished at the request of the prime contractor. Judgment was entered accordingly, together with interest. Upon consideration of an appeal, we reversed the judgment upon the ground that the subcontractor had not exhausted its administrative remedies as required by the "disputes clause" in the prime contract. We have reconsidered this question on rehearing, and the former opinion is hereby withdrawn.

Fanderlik entered into a contract with the United States wherein it agreed to construct 175 dwelling units at Clovis Air Force Base in Curry County, New Mexico. As required by the Miller Act, Fanderlik delivered to the United States a payment bond, executed by Grand American Indemnity Company, which guaranteed the payment of all sums due to persons supplying labor and materials in the performance of the requirements of the contract. Thereafter, for a consideration of $63,630.00, a subcontract was awarded to the plaintiff, M. B. Morgan, d b a M. B. Morgan Painting Contractor, wherein Morgan agreed to furnish all labor, materials and equipment necessary to complete the painting requirements of the prime contract. During the performance of the subcontract, there were failures of paint which had been applied to both interior and exterior surfaces and all of the surfaces upon

[1] The plaintiff will be referred to herein as "Morgan," or the "subcontractor;" the defendant Fanderlik-Locke Co., as "Fanderlik," or the "prime contractor"

which the paint failed were repainted by Morgan upon the demand of Fanderlik and the architects supervising the job. There was also considerable repainting required because of storm damage and for other reasons. Morgan submitted claims to Fanderlik for this additional work.

The prime contract was the standard form of government construction contract in general use at the time of its execution. Section 6 of the general provisions thereof states:

> Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the head of the department, and the decision of the head of the department or his duly authorized representatives for the hearings of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive: Provided, That, if no such appeal to the head of the department is taken, the decision of the Contracting Officer shall be final and conclusive . . .

Upon receipt of Morgan's claims, the prime contractor, following the procedure of Section 6, submitted corresponding claims to the Contracting Officer at Clovis Air Force Base. They were all denied by the Contracting Officer, and, at the time of the trial, an appeal was pending before the Board of Contract Appeals of the Air Force. The Fanderlik claims to the Contracting Officer included those upon which recovery is sought in this action.

The subcontract provided that the subcontractor should furnish material and perform labor in accordance with the general conditions of the contract between the owner and the contractor and

"in accordance with the Drawings and the Specifications attached hereto which form a part of a Contract between the Contractor and the Owner . . . and hereby become a part of this Contract." The parties to the subcontract agreed "to be bound by the terms of this Agreement, the A.I.A. General Conditions attached, the drawings and specifications attached as far as apprehensible to this subcontract . . .". It was further provided that the subcontractor should be bound to the contractor "by the terms of the Agreement, General Conditions, Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the Owner."

It is contended that by these references, Section 6 of the general provisions of the prime contract was incorporated in the subcontract, and that a suit under the Miller Act cannot be maintained by the subcontractor until there is a final determination of the claims submitted under Section 6. While we express no opinion as to the right of the parties to enter into an agreement which might circumvent the Miller Act, we hold that it was not the intention of the parties to the subcontract that the subcontractor was required to comply with the provisions of Section 6 before it could maintain an action under the Miller Act.

The purpose of the Miller Act is to provide security for those who furnish labor and material in the performance of government contracts, and a liberal construction should be given the Act to accomplish this purpose. *United States v. Carter*, 353 U.S. 210; *St. Paul-Mercury Indem. Co. v. United States*, 10 Cir., 238 F. 2d 917; *Fourt v. United States*, 10 Cir., 235 F. 2d 433; *Commercial Standard Ins. Co. v. United States*, 10 Cir., 213 F. 2d 106. The benefits of the Act are not intended for the prime contractor who is required by the Act to furnish a bond to effectuate its provisions. If a prime contractor is dissatisfied with the administrative disposition of a claim submitted under the "disputes clause" of the prime contract, it may seek a remedy in the Court of Claims. The liability of the United States is to the prime contractor, and the "disputes

clause" provides only for administrative consideration of claims made by the prime contractor.

There is no procedure by which the claim of a subcontractor can be presented against the United States except as it may become a claim of the prime contractor, since there is no contract, express or implied, between the subcontractor and the government. *United States* v. *Blair*, 321 U.S. 730, 737. The subcontractor has no standing before the Contracting Officer or the Board of Contract Appeals, and no provision is made for the hearing of disputes between a prime contractor and a subcontractor. The remedy for one seeking to recover for labor and materials furnished on a government contract is under the Miller Act, and ordinarily the fact that a prime contractor has a claim for the same amounts pending under the "disputes clause" of the prime contract, does not affect Miller Act cases.[2] It appears that, as in this case, when a subcontractor's claim was being litigated, the administrative proceeding pertaining to the corresponding claim made by the prime contractor would, in many instances, be delayed until there was a determination of the prime contractor's liability. If the subcontractor failed to sustain his claim in a Miller Act case, there would be no basis for the prime contractor's claim then pending before the Contracting Officer or the Board of Contract Appeals.

Actions under the Miller Act shall be in the name of the United States, for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed, regardless of the amount in controversy. 40 U.S.C.A. §270b(b). The books are replete with cases brought under this Act. Without exception they have been tried in the United States District Court as any other action for money and many of them have been tried by a jury. See e.g., *Nolan Bros.* v. *United*

[2] *John A. Johnson & Sons* v. *United States*, 4 Cir., 153 F. 2d. 534, cert. denied 328 U.S. 865. In *Wunderlich Contracting Co.* v. *United States*, 240 F. 2d. 201, cert. denied 353 U.S. 950, we noted that the prime contractor had submitted claims to the United States for the amounts claimed by the subcontractor, and that many of them were pending at the time of trial.

States, 10 Cir., 266 F. 2d 143; *Indemnity Ins. Co. of No. Am. v. Browning-Ferris Mach. Co.*, 6 Cir., 227 F. 2d 804; *Dow v. United States*, 10 Cir., 154 F. 2d 707. If Morgan is limited to the presentation of his claims as provided for in the "disputes clause" of the prime contract, he has surrendered his right to the benefits of the Miller Act provisions. The findings of the administrative authorities as to the amount he is entitled to recover would be conclusive, unless the court determined them to be "fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith." See 41 U.S.C.A. §321. An agreement should not be construed to bring about such a result unless it be "manifest by plain language" of the contract. *United States v. Moorman*, 338 U.S. 457, 462; *Mercantile Trust Co. v. Hensey*, 205 U.S. 298, 309. The language of the subcontract manifests no such intention.[3] The subcontract references are to the "general conditions" of the prime contract not the "general provisions," and they relate generally to performance of the subcontract according to specifications, not to the settlement of disputes, or the subcontractor's right to sue under the Miller Act.

This brings us to the merits of the case. It is admitted that there is due on the subcontract, and for certain extras, the sum of $14,533.76. This appeal involves the allowance of the remaining $96,179.84.[4] It is the contention of Fanderlik that the agreement of the parties is clearly expressed in the subcontract, and that the allowance of the disputed items resulted from the failure of the trial court to enforce the obligations of the contract. In other words, with the exception of the admitted extras, it is contended that the subcontractor did nothing more than what was required of him by the contract. The subcontractor contends that the trial court's find-

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[3] In fact, the subcontract makes the American Institute of Architects General Conditions, Sixth Edition, Articles 1 to 44 a part of the subcontract. Article 40 of the A.I.A. General Conditions establishes an arbitration procedure, and Section 23(m) and 23(n) of the subcontract proper pertain to the rights of the subcontractor to submit evidence and nominate an arbitrator in the event the arbitration procedure is invoked.

[4] The items which make up this amount are listed by the prime contractor as follows:

ings to the contrary are supported by substantial evidence and are not clearly erroneous. We have held, in accordance with Rule 52(a) of the Federal Rules of Civil Procedure, in a number of Miller Act cases tried to court without a jury, that findings of fact will not be disturbed on appeal if they are sustained by the evidence and are not clearly erroneous. E.g., *Wunderlich Contracting Co. v. United States*, 240 F. 2d 201, cert. denied 353 U.S. 950, *St. Paul-Mercury Indem. Co. v. United States*, supra.

Shortly after the subcontract was executed a change order was made which, for an additional payment of $2,500.00, provided for three coats of paint on all exposed interior beams, instead of two coats of stain. The specifications called for two coats of enamel finish on all interior beams. In substance, Morgan testified that when he made his estimate of the cost of painting the interior of the buildings, it was assumed that the ceilings were without beams, and Fanderlik agreed to pay an additional $2,500.00 for this work, and executed the change order to this effect. Morgan also testified that the laminated beams in the ceilings of all the units were made of rough, unfinished lumber, in which there were many cracks, knot holes and extensive separation where the boards had been jolted or nailed together; and that extensive use of putty and spackle was necessary to prepare the surface for painting; he stated that because of this condition, it was agreed between the parties and the architects that a flat paint should be used instead of enamel but that the flat paint did not work out because of the putty and spackle which was visible through the paint.

(Continued)

Item	Amount Awarded by Court and Included in Judgment
1. Repainting interior beams	$ 5,633.25
Change Order No. 1	1,666.67
2. Repainting exterior beams and woodwork	41,622.55
3. Repainting interior trim and interior doors	12,813.17
4. Repainting due to weather damage	25,612.70
5. Storm damage (storm of July 20, 1956)	3,092.80
6. Repainting caused by activities of other crafts	4,765.55
Total	$96,179.84

Early in the project, the prime contractor constructed a model, or pilot house, which was completely finished, including all painting. The trial court found that the model house was to serve as a "test house" for all future work on the project. After a test in the model house the parties agreed to use an exterior alkyd luminal paint on the beams. This "worked out fine" until warm weather caused the sap, or resin, in the beams to show through the luminal. When this occurred, at the direction of Fanderlik all the beams were repainted with an enamel paint, but from 60 to 75 percent of the beams had already been painted with luminal and all of the 175 units received an extra coat of paint.

There was evidence that the total cost of the additional painting of the interior beams was $5,633.25. In addition to the aforesaid amount, the court allowed the recovery of $1,666.67 which apparently was two-thirds of the $2,500.00 provided in the change order for the painting of the interior beams. There is evidence in the record to support the allowance of these items and they were properly allowed.

The specifications required one coat of primer and one coat of alkyd flat paint on all exterior beams and woodwork. The trial court found that the exterior painting performed by the subcontractor met the specifications, and that a later failure of the paint was not "due to defects in material or workmanship" supplied by the subcontractor. The court also found that Fanderlik directed the subcontractor, in writing, to scrape all the exterior painted surfaces and repaint them, the reasonable cost of which was $41,672.75. It is conceded that the paint first used was equal to the specifications, and there was substantial evidence to sustain the finding that the failure was not caused by its improper application. Morgan testified that the failure resulted from the use of a poor grade of lumber which was specified for the job and that under written instructions, the exterior of all the buildings was repainted by him.[5]

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[5] Morgan testified as to the second painting as follows:

There was expert testimony that the paint was equal to that specified, and that the failure was due to inadequate specifications, and excess moisture in a low-quality wood. It is significant that within a short time the second painting also failed in the same manner as the first, but it was not repainted by the subcontractor. The first exterior painting of the buildings having been performed as required by the subcontract and specifications, the work of removing it and repainting the surfaces was not a condition of the subcontract, but additional work for which the prime contractor was responsible. *United States v. Williams*, 10 Cir., 240 F. 2d 561. The evidence is adequate to sustain the allowance of this item.

The specifications provided for two coats of paint, the second to be semi-gloss enamel, on the interior trim and doors. In the model house, Fanderlik and the architects determined that an exterior flat paint, rather than the specified semi-gloss enamel, should be used. Thereafter the subcontractor, with the knowledge of Fanderlik and the architects, proceeded to paint the interior trim and doors in the same manner as in the model house. After all of the 175 units had been completed, the subcontractor was instructed, in writing, to proceed to repaint all of the interior trim and doors with enamel paint. The trial court concluded that the subcontractor had been authorized to paint the interior trim and doors in the same manner as in the model house, and that compliance with the demand to repaint with enamel required additional work and

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(continued)

"Q. Now, when you applied the exterior paint, did you apply it to all 175 houses? A. Yes.

"Q. And what happened, when this paint failure occurred? Were you required to correct it, or— (Interrupted) A. I was required by a letter from Mr. — from the Fanderlik-Locke people, to take it off and scrape it clear down to the wood, where it was necessary to get all the loose paint off down to the wood, re-prime it, and re-paint it with the same materials we had used before, and we started in by having the painters removing it, and then painting it as they were there, and they objected to that. We had to completely clean and get a whole house or unit, double house done, the inspector would come by with pocket knives and things, over it, to find out if we had gotten it done right, before we could apply the paint a second time, and that is the way we proceeded to do the job."

material, for which the subcontractor was entitled to recover a reasonable amount, in the sum of $12,815.17. No serious contention is made that the evidence does not support this finding.

During the course of the construction of the project, walls of different houses which had been painted by Morgan were damaged by other workmen. Fanderlik requested that these be repainted by Morgan. The trial court found that "This repainting was in no way caused by any defects of material or workmanship by Use-Plaintiff. All of such work was done at the request of Fanderlik-Locke Co. since the inspectors would not accept the job until such work was done." The evidence was uncontradicted that the reasonable value of this work was $4,785.55, and that amount was properly allowed.

The foregoing claims are not for items caused by a breach of the subcontract by Morgan, but they are for the reasonable value of labor and materials which were furnished in addition to that required by the contract. The recovery of a subcontractor is limited to that of his contract if he furnished only labor and material necessary to comply therewith, but this is not that kind of a case. Here, the subcontractor performed his contract according to the specifications, and agreed changes, and after this was accomplished, upon instructions of the prime contractor who received the benefit thereof, he did additional work, in most instances with the knowledge of and instruction by the architects overseeing the job for the government. For this he is entitled to recover the reasonable value of the additional services and materials.[6] *Wunderlich Contracting*

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[6] In *United States v. Williams*, 240 F. 2d 561, 563, we said:

"In making its conclusions, the trial court stated '3 *** Neither Ardmore nor Saxet were at liberty to disregard the written instructions of the officials in charge of the work at the Ardmore Air Base regarding the change in the concrete mix. The loss which Saxet seeks to recover was not occasioned by any wrongful act of Ardmore. This loss, in my judgment, should be ultimately borne by the United States, but legally this Court is not able to render such a judgment ***.' Since the appellant, Ardmore, had no direct contractual relationship with the United States, we agree with the trial court's dual conclusion that the ultimate loss should be in good conscience borne by, but cannot in this action be shifted to, the United States. The rule would be otherwise if Ardmore had contracted directly with the United States, and it

Co. v. *United States*, supra; *St. Paul-Mercury Indem. Co. v. United States*, supra; *Southern Painting Co. v. United States*, 10 Cir., 222 F. 2d 431. Where, at the request of the prime contractor, labor and material is furnished by a subcontractor which is in addition to that required in the subcontract, there is an implied promise to pay the reasonable value therefor. We agree with the conclusion of the trial court that: "With respect to all of the additional work required of the Use-Plaintiff hereinabove referred to in the previous conclusions, the conduct of Fanderlik-Locke Co. (a) amounted to a waiver of the requirements of the contract respecting the method and time of change orders, or (b) by its directions for re-performance of work rather than true additions to the work made said requirements inapplicable thereto." We sustained findings in favor of the subcontractor under somewhat similar facts in *Wunderlich Contracting Co. v. United States*, supra,[7] and *United States v. Williams*, supra. See also *Continental Cas. Co. v. Schaefer*, 9 Cir., 173 F. 2d 5, cert. denied 337 U.S. 940; *John A. Johnson & Sons v. United States*, 4 Cir., 153 F. 2d 534, cert. denied 328 U.S. 865; *Ross Engineering Co. v. Pace*, 4 Cir., 153 F. 2d 35.

Finally it is contended by Fanderlik that the court erred in allowing recovery on two claims arising out of repainting made necessary because of damage caused by the elements. One of these claims is for weather damage in the amount of $25,612.76, caused by dust and water throughout the course of the construction. The other claim of $3,992.89 is for water damage to interior painting attributable to a storm which occurred on July 20, 1956. There was

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[6] (continued)

is well-settled law that the government must respond in damages where it has thus misled one of its contractors."

[7] In *Wunderlich Contracting Co. v. United States*, 240 F. 2d 201, 205, it was said:

"A contractor who bids for work has the right to rely on the plans and specifications submitted to him for bidding purposes. The rights of the parties are to be measured by them. It is only through the plans and specifications that he can make an intelligent bid. *Ryan v. Curlew Irr. & Res. Co.*, 36 Utah 382, 104 P. 218. Burdens other than those contemplated by the contract, may not be placed upon the contractor without additional compensation . . ."

evidence that this interior damage resulted from inadequate construction of the houses, and the trial court found the damage was not due to any fault of Morgan. At the trial, Morgan testified that in nearly all instances he told Fanderlik he expected to be paid for the additional work. He further stated that he was told by the contractor that he would be paid.[8] With respect to the interior storm damage the parties agreed upon the rate of 20c per square foot for repainting the damaged surfaces, which agreement was a recognition that this was extra work. *Bernard-Curtiss Co. v. United States*, 10 Cir., 257 F. 2d 565, cert. denied 358 U.S. 906. The claim for $3,992.89 was properly allowed.

With respect to the other weather damage, title to the paint passed to Fanderlik under the doctrine of accession[9] at the time the paint was applied. Therefore any responsibility on the part of Morgan to absorb the loss caused by the weather damage must be found in the express terms of the subcontract. In subcontracts of this kind the risk of loss must be borne by the prime contractor unless there is a clear provision in the contract which shifts the risk of loss to the subcontractor. Fanderlik relies upon Section 7 of the subcontract which provides, in part, as follows:

> In addition, the Subcontractor will insure the works to cover his interest in the same from time to time and for any loss of the Subcontractor by fire, earth settlement, earthquake, theft, embezzlement, riot, or any other cause whatsoever. The Subcontractor, upon request, shall exhibit said insurance policies to contractor for its examination and approval, or furnish a

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[8] This testimony was as follows:

"Q Go ahead, Mr. Morgan. A (continuing) I was told when I objected, to do this work without some way of knowing that I would be paid for it, I was told by Mr. Locke, personally, when their supervision on the job couldn't answer me, that they would pay me; I got in touch by telephone with Mr. Locke, and he assured me that they were adequately covered by insurance, that all I needed to do was to get the job done, where they could sell the buildings, and that they would pay me, they would turn the Claim over to their Insurance Company and get my money for me."

[9] 1 Am. Jur. Accession § 2 (1938).

> Certificate of Insurance Satisfactory to Contractor. The Contractor reserves the right to protect the works, at its option, by insurance, to cover its interest when payments have been made to the Subcontractor, or otherwise.

In asserting that the responsibility was Morgan's, Fanderlik refers only to the first sentence of the quoted language. It is, however, the rule that the intention of the parties to a contract should be deduced from the contract as a whole, rather than from a specific provision. *United States v. Essley*, 10 Cir., ___ F.2d ___, and cases cited therein. Upon examining all of the relevant language in Section 7, it appears that the last sentence in the quoted language gave to Fanderlik an option to insure the works "when payments have been made to the Subcontractor, or otherwise." Taking the two sentences together, it seems clear that the parties intended that at some point, the burden of insuring the works would be assumed by Fanderlik. This court has frequently stated that where the parties to a contract have accorded it a practical construction by their conduct, this construction will be given substantial weight in determining the proper interpretation, particularly if the conduct manifesting their construction occurred prior to any controversy. E.g., *United States v. Luther*, 10 Cir., 225 F.2d 499, cert., denied 350 U.S. 947; *Saulsbury Oil Co. v. Phillips Petroleum Co.*, 10 Cir., 142 F.2d 27; *Lackey v. Ohio Oil Co.*, 138 F.2d 449; *Commercial Standard Ins. Co. v. Remer*, 10 Cir., 119 F.2d 66. Fanderlik's statements to Morgan that he would be paid for the repainting, and its indication that it proposed to submit claims to its insurance company, clearly indicate that, so far as Fanderlik was concerned, whatever events were contemplated as the ones upon the occurrence of which it would insure had already happened at the time that the weather damage was inflicted. Therefore, this amount also is allowable to Morgan as additional work done outside the subcontract. Additionally, the same portion of the record can be interpreted as revealing an agreement to pay for the work. This would perhaps of itself be sufficient to justify the allowance of this claim. *Barnard-Curtiss Co. v. United States*, supra.

In addition to the claims themselves, Fanderlik disputes the interest awarded by the trial court of 6% on the sum of $18,526.65 from August 17, 1956. The $18,526.65 is composed of $10,259.00, the balance admittedly due on the subcontract, $4,533.76, the amount of the admitted extras due under written change orders, and $3,992.89, which was the amount due for the repainting necessitated by the storm damage of July 20, 1956. In New Mexico interest is allowable on an unliquidated claim which can be calculated, even though the claim itself is disputed. *Anderson-Prichard Oil Corp. v. Parker*, 10 Cir., 245 F. 2d 831; *J. P. (Bum) Gibbons, Inc. v. Utah Home Fire Ins. Co.*, 10 Cir., 202 F. 2d 469; *Woolley v. Bishop*, 10 Cir., 180 F. 2d 188. The first two amounts were sums certain in this instance, and the $3,992.89 was susceptible to accurate calculation. Therefore, since Morgan makes no contention that any additional interest should have been allowed, it is our conclusion that the amount of interest awarded by the trial court was correct.

Affirmed.

BRATTON, *Circuit Judge*, dissenting:

Section 6 of the prime contract concerns itself only with disputes over questions of fact. Respecting questions of that kind, it provides administrative mechanism through which adjustments may be made and errors corrected on an administrative level. The mechanism is exclusive in nature. In the absence of some clear showing that the appeal procedure is inadequate or unavailable, such procedure must be pursued and exhausted before a contractor can be heard to complain in court. And when a contractor seeks to ignore the provisions and institute an action against the United States without having pursued and exhausted the administrative procedure, the action should be dismissed or proceedings stayed until the administrative remedy has been pursued and exhausted. *United States v. Callahan Walker Construction Co.*, 317 U.S. 56; *United States v. Blair*, 321 U.S. 730; *United States v. Joseph A. Holpuch Co.*, 328

U.S. 234; *United States v. Moorman*, 338 U.S. 457; *United States v. Wunderlich*, 342 U.S. 98. Viewed in light of these cases, it is crystal clear that if this were an action by the contractor against the United States in which recovery is sought under the prime contract, the contractor would be denied judicial relief until after the administrative procedure provided in section 6 had been fully exhausted.

This is not an action by the contractor against the United States. In substance, it is an action of the subcontractor and his assignee against the contractor and the surety on the payment bond. The subcontractor was not a party signatory to the prime contract, and the subcontract did not contain a provision identical or similar in substance to section 6 of the prime contract. But the subcontract provided that the subcontractor should furnish material and perform labor "in accordance with the General conditions of the Contract between the Owner and the Contractor and in accordance with the Drawings and the Specifications attached hereto which form a part of a Contract between the Contractor and the Owner . . . and hereby become a part of this Contract"; provided that any and all materials, labor and work furnished or performed by the subcontractor should comply with the requirements of the contractor and any governmental agency having jurisdiction thereof, and that the acceptance and approval of such agency or party was a condition precedent to the payment of any money by the contractor under the subcontract; provided that it should be the responsibility of the subcontractor to obtain the approval of the governmental agencies with respect to the material furnished and the work done under the subcontract; and provided that the contractor and the subcontractor agree "to be bound by the terms of this Agreement, the A.I.A. General Conditions attached, the drawings and specifications attached as far as apprehensible to this subcontract . . ." It further provided that the subcontractor should be bound to the contractor "by the terms of the Agreement, General Conditions, Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the owner." And it further provided that the contractor should be

bound to the subcontractor "by all the obligations that the Owner assumes to the Contractor under the Agreement, General Conditions, Drawings and Specifications, and by all the provisions thereof affording remedies and redress to the Contractor from the Owner." And it contained other provisions adding to the knit or interweave of the subcontract to the prime contract. When construed in their entirety, the effect of the two contracts was to integrate section 6 of the prime contract into the subcontract and make it applicable to disputes of fact between the contractor and the subcontractor. *United States* v. *Bruce Construction Corp.*, 272 F. (2d) 62. And since that section has application to disputes between the contractor and the subcontractor over questions of fact, the exhaustion of the administrative remedy provided in the section is a prerequisite to the right to maintain the action to final judgment.

It is my view that the judgment should be vacated and the cause remanded with directions to stay proceedings awaiting final disposition of the claim pending before the Board of Appeals for the Air Force.

JUDGMENT

Thirteenth Day, November Term, Wednesday,

November 30th, 1960.

Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable John C. Pickett, *Circuit Judges*.

This cause came on for rehearing, and was argued by counsel

On consideration whereof, it is ordered and adjudged by this court that the judgment of the United States District Court for the District of New Mexico be and the same is hereby affirmed.

Order denying appellants' petition for rehearing en banc Thirty-Second Day, November Term, Saturday, December 31st, 1960.

Before Honorable Alfred P. Murrah, *Chief Judge*, and Honorable Sam G. Bratton, Honorable Walter A. Huxman, Honorable John C. Pickett, Honorable David T. Lewis and Honorable Jean S. Breitenstein, *Circuit Judges*.

This cause came on to be heard on the motion of appellants for a rehearing herein en banc and was submitted to the court.

On consideration whereof, it is ordered by the court that the said motion be and the same is hereby denied.

Order denying appellants' petition for rehearing Thirty-Second Day, November Term, Saturday, December 31st, 1960.

Before Honorable Alfred P. Murrah, *Chief Judge*, and Honorable Sam G. Bratton, Honorable Walter A. Huxman, Honorable John C. Pickett, Honorable David T. Lewis, and Honorable Jean S. Breitenstein, *Circuit Judges*.

This cause came on to be heard on the petition of appellants for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the same petition be and the same is hereby denied.

By order of January 16, 1961, the mandate of the United States Court of Appeals was stayed for a period of thirty days under provision of paragraph 3 of rule 28 of said court.

APPENDIX B

OPINION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No 6144 — March Term, 1960

FANDERLIK-LOCKE CO., a corporation, and GREAT AMERICAN INDEMITY COMPANY, a corporation, *Appellants,* v. UNITED STATES OF AMERICA, for the use of M. B. Morgan, doing business as M. B. MORGAN, PAINTING CONTRACTOR; and NEW AMSTERDAM CASUALTY COMPANY, *Appellees.*	Appeal from the United States District Court for the District of New Mexico

DAVID R. GALLAGHER (MCATEE, TOULOUSE & MARCHIONDO was with him on the brief) for *Appellants*.

JOHN P. EASTHAM and WILLIAM A. SLOAN (RODEY, DICKASON, SLOAN, AKIN & ROBB was with them on the brief) for *Appellees*.

Before BRATTON, HUXMAN and PICKETT, *Circuit Judges*.

BRATTON, *Circuit Judge*.

Filed, United States Court of Appeals, Tenth Circuit, May 2, 1960.

ROBERT S. CARTWRIGHT, *Clerk*.

In this action instituted under the Miller Act, 40 U.S.C. §270a, et seq., the contractor under a government contract to construct one hundred and seventy-five housing units at the air force base at Clovis, New Mexico, and the surety on the payment bond furnished by the contractor appealed from a judgment in favor of a subcontractor and his assignee.

The United States awarded to Fanderlik-Locke Company a contract to construct the housing units. Fanderlik-Locke Company, as principal, and Great American Indemnity Company, as surety, delivered to the United States a payment bond. Fanderlik-Locke Company, hereinafter referred to as the contractor, awarded to M. B. Morgan, hereinafter referred to as the subcontractor, a subcontract to furnish labor materials, and equipment to complete the painting of the houses. New Amsterdam Casualty Company issued its performance bond to the contractor.

The United States for use and benefit of the subcontractor and his assignee, New Amsterdam Casualty Company, instituted the action against the contractor and the surety on the payment bond. It was alleged in the amended complaint that during the performance of the subcontract, the subcontractor furnished labor and materials required by the subcontract and did extras and additional work at the request of the contractor to the aggregate amount of $183,259.20; that the contractor paid to the subcontractor $53,371.00; and that the balance due was $129,888.20. By separate answers, the contractor and the surety on the payment bond denied liability; and by counterclaims, they sought to recover for the reasonable cost of repairing and redoing certain alleged defective work of the subcontractor and for costs incurred in the action. The contractor and the surety on the payment bond moved to dismiss the action upon the ground that it was prematurely brought in that final disposition had not been made through administrative channels of a claim based upon the same items as those upon which recovery was sought in the action. When the motion was first made, ruling thereon was reserved. A general ruling later denying objec

tions previously made may or may not have included the motion. In any event, the motion was denied or no disposition was made of it. Sketchily stated, the court found in effect that at the direction of the contractor, the subcontractor furnished materials and performed labor in connection with certain alternates and extras; and that at the direction of the contractor, he also furnished materials and performed labor in connection with the redoing of certain painting made necessary solely by weather conditions. Judgment was entered for the subcontractor and his assignee against the contractor and the surety on the payment bond in the sum of $110,713.60, and also for interest on a specified amount from a specified date as to the date of payment.

The contention is made that section 6 of the prime contract made available to the subcontractor an administrative remedy; that the exhaustion of such remedy was a prerequisite to the right to maintain the action; that such remedy was not exhausted; and that, therefore, the action could not be maintained. The prime contract was the standard form of government construction contract in general use at the time of its execution. In presently material part, section 6 provided:

> Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the head of the department, and the decision of the head of the department or his duly authorized representatives for the hearings of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive: Provided, That, if no such appeal to the head of the department is taken, the decision of the Contracting Officer shall be final and conclusive.

The contractor submitted to the contracting officer at the air force base a claim for the items upon which recovery was sought in this action; the contracting officer denied and rejected the claim in toto; and at the time of the trial, an appeal was pending before the Board of Contract Appeals of the Air Force. Section 6 concerns itself only with disputes over questions of fact. Respecting questions of that kind, it provides administrative mechanism through which adjustments may be made and errors corrected on an administrative level. The mechanism is exclusive in nature. In the absence of some clear showing that the appeal procedure is inadequate or unavailable, such procedure must be pursued and exhausted before a contractor can be heard to complain in a court. And when a contractor seeks to ignore the provision and institute an action against the United States without having pursued and exhausted the administrative procedure, the action should be dismissed or proceedings stayed until the administrative remedy has been pursued and exhausted. *United States v. Callahan Walker Construction Co.*, 317 U.S. 56; *United States v. Blair*, 321 U.S. 730; *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234; *United States v. Moorman*, 338 U.S. 457; *United States v. Wunderlich*, 342 U.S. 98. Viewed in the light of these cases, it is crystal clear that if this were an action by the contractor against the United States in which recovery is sought under the prime contract, the contractor would be denied judicial relief until after the administrative procedure provided in section 6 had been fully exhausted.

This is not an action by the contractor against the United States. In substance, it is an action by the subcontractor and his assignee against the contractor and the surety on the payment bond. The subcontractor was not a party signatory to the prime contract, and the subcontract did not contain a provision identical or similar in substance to section 6 of the prime contract. But the subcontract provided that the subcontractor should furnish material and perform labor "in accordance with the General conditions of the Con-

tract between the Owner and the Contractor and in accordance with the Drawings and the Specifications attached hereto which form a part of a Contract between the Contractor and the Owner. . . . and hereby become a part of this Contract;" provided that any and all materials, labor and work furnished or performed by the subcontractor should comply with the requirements of the contractor and any governmental agency having jurisdiction thereof, and that the acceptance and approval of such agency or party was a condition precedent to the payment of any money by the contractor under the subcontract; provided that it should be the responsibility of the subcontractor to obtain the approval of the governmental agencies with respect to the material furnished and the work done under the subcontract; and provided that the contractor and the subcontractor agree "to be bound by the terms of this Agreement, the A.I.A. General Conditions attached, the drawings, and specifications attached as far as apprehensible to this subcontract . . ."It further provided that the subcontractor should be bound to the contractor "by the terms of the Agreement, General Conditions, Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the owner." And it further provided that the contractor should be bound to the subcontractor "by all the obligations that the Owner assumes to the Contractor under the Agreement, General Conditions, Drawings and Specifications, and by all the provisions thereof affording remedies and redress to the Contractor from the Owner." And it contained other provisions adding to the knit or interweave of the subcontract to the prime contract. When construed in their entirety, the effect of the two contracts was to integrate section 6 of the prime contract into the subcontract and make it applicable to disputes of fact between the contractor and the subcontractor. *United States v. Bruce Construction Corp.*, 272 F. (2d) 62. And since that section has application to disputes between the contractor and the subcontractor over questions of facts, the exhaustion of the administrative remedy provided in the

section is a prerequisite to the right to maintain the action to final judgment.

The judgment is vacated and the cause is remanded with directions to stay proceedings awaiting final disposition of the claim pending before the Board of Appeals for the Air Force.

JUDGMENT

Twenty Seventh Day, March Term, Monday, May 2, 1960.

Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable John C. Pickett, *Circuit Judges*.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the United States District Court for the District of New Mexico be and the same is hereby vacated and the cause remanded with directions to stay proceedings awaiting final disposition of the claim pending before the Board of Appeals for the Air Force.

Order granting appellees' petition for rehearing. Twenty Fifth Day, May Term, Wednesday, July 13th, 1960.

Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable John C. Pickett, *Circuit Judges*.

This cause came on to be heard on the petition of appellees for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the same petition be and the same is hereby granted.

ORDER OF SUBMISSION

Sixth Day, September Term, Monday, September 19th, 1960.

Before HONORABLE SAM G. BRATTON, HONORABLE WALTER A. HUXMAN and HONORABLE JOHN C. PICKETT, *Circuit Judges.*

This cause came on for rehearing; WILLIAM A. SLOAN, *Esquire*, and JOHN P. EASTHAM, *Esquire*, appearing for *appellees*, DAVID R. GALLAGHER, *Esquire*, appearing for *appellants*.

On motion, appellants were granted leave to file a typewritten brief in opposition to the motion for rehearing instanter, which was accordingly done.

Thereupon this cause was argued by counsel and submitted to the court.

Appendix C

The understanding of the Congress as to the Miller Act:

The Title:

"AN ACT requiring contracts for the construction, alteration, and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by an additional bond for the protection of persons furnishing material and labor for the construction, alteration, or repair of said public buildings or public work." 49 Stat. 793 (1935).

The Congressional debate:

House of Representative:

The Committee Report (H.R. 8519):

"Under this bill the contractor on all contracts of more than $2,000.00 will furnish two bonds. . . .

(b) A payment bond *for the protection* of all persons furnishing labor or material in the prosecution of the work provided for in such contract."

Comm. Report, H. Rep. 1263, 74th Cong., 1st. Sess.

The debate in the House:

"Mr. MILLER. Mr. Speaker, I ask unanimous consent for the present consideration of the bill (H.R. 8519) requiring contracts for the construction, alteration, and repair of any public building or public work of the U.S. to be accompanied by a performance bond protecting the U.S. and by an additional bond for the protection of persons furnishing material and labor for the construction, alteration or repair of said public buildings or public work

"Mr. MARTIN of Mass: Mr. Speaker, I reserve the right to object. Will the gentleman please explain the bill?

"Mr. MILLER: This bill merely provides that in the construction of public buildings and other public works there shall be two bonds, one for the performance of the contracts with the Government and the other a payment bond for the protection of subcontractors and those furnishing the labor and material.

"Under the present law we have but one bond, with a dual obligation, but it is not satisfactory in that it does not afford protection to the subcontractors, materialmen, and laborers.

"This merely provides two bonds, one for the protection of the Government's interests, and the other for the protection of the rights of labor, the sub-contractors, and the material furnishers. It permits the filing of a suit on the payment bond 90 days after the work has been done, or the material furnished.

"Mr. MARTIN of Mass.: It gives *protection* to the sub contractors?

"Mr. MILLER: That is right."

79 *Cong. Rec., Part* 11, *p.* 11702.

Senate debate:

"Mr. BURKE: Mr. President, this bill proposes to amend what is known as the 'Heard Law.' It provides, in the case of contracts with the Government, in an amount more than $2,000.00 that the contractors shall be required to give two bonds instead of one, as at the present time. Under the present law a performance bond is given for the protection of the Government. This bill would amend for the protection of the materialmen and laborers, subcontractors, and all who put forth their labor or furnish materials or incur expenditures in connection with the work.

* * * *

"Mr. WALSH: As I understand, the bill will require a contractor, in furnishing a bond, not only to be liable for default by reason of his inability to complete the contract or by reason of failing to meet the requirements and specifications as to material, but will require him to meet the claims of workers and employees who did not receive their compensation.

"Mr. BURKE: That is the point exactly.

"Mr. WALSH: Of course, it is a most meritorious bill, and should be enacted."

70 *Cong. Rec., Part 12, p. 13382*

Appendix D

The Miller Act:

§270a. Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country.

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. (Aug. 24, 1935, ch. 642, § 1, 49 Stat. 793.)

§270b. Same; rights of persons furnishing labor or material.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him; *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit. (Aug. 24, 1935, ch. 642, § 2, 49 Stat. 794.)

The Act of May 11, 1954:

§321. Limitation on pleading contract-provisions relating to finality; standards of review

No provision of any contract entered into by the United States relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. (May 11, 1954, ch. 199, § 1, 68 Stat. 81.)

§322. Contract provisions making decisions final on questions of law

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board. (May 11, 1954, ch. 199, § 2, 68 Stat. 81.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 720

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 720

FANDERLIK-LOCKE CO., a corporation, and GREAT AMERICAN INDEMNITY COMPANY, *Petitioners*,

v.

UNITED STATES OF AMERICA, for the use of M. B. Morgan, doing business, as M. B. MORGAN PAINTING CONTRACTOR; and NEW AMSTERDAM CASUALTY COMPANY, *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Respondents have no objection to the portions of the petition entitled "Opinions Below" and "Jurisdiction". The Respondents are dissatisfied with the Petitioners' "Questions Presented", "Statutes", "Statement of the Case" and "Reasons for allowance of the Writ".

QUESTIONS PRESENTED

The sole question presented by the petition is whether this Court will review a case in which the only issue is whether the Court of Appeals for the Tenth Circuit correctly interpreted the inter-relation of two contracts. The two questions presented by Petitioners ignore the opinion of the Court of Appeals, which was based solely on the interpretation of the contracts.

STATUTES

Since this is a Miller Act case, the provisions of that statute are relevant. However, because of the contractual interpretation basis of the decision of the Court below, the provisions of 68 Stat. 81 (1954), 41 U.S.C. 321, 322, are in no way relevant to this case.

STATEMENT OF THE CASE

Respondents object to Petitioners' Statement of the Case in that it is composed in major part of arguments and of allegations unsupported by any facts.

Petitioners attempt to convey the impression that the subcontractor respondent was a party to the claim filed by the prime contractor with the Air Force contracting officer and with the Board of Contract Appeals. This is simply not so, and, in fact, respondent was specifically denied the right to have any standing before the Board of Contract Appeals by the Board itself.

Petitioners state on Page 5 of the Petition that the subcontract did not expressly contain a disputes clause. We call the attention of the Court to the portion of the opinion of the Court of Appeals for the Tenth Circuit shown on page 6, footnote 3 of Appendix A

to the Petition. This footnote shows that the subcontract had a provision on arbitration diametrically opposed to the standard disputes clause found in paragraph 6 of the "General Provisions" of the prime contract.

Petitioners, in setting out what they determined to be relevant provisions of the two contracts, failed to point out the distinction relied on by the Tenth Circuit between the phrase "General Conditions", used in the subcontract, and the phrase "General Provisions", used in the prime contract. The "General Conditions" of the subcontract referred specifically to "The General Conditions of the Contract for the Construction of Buildings", A.I.A. form A-2 (Rev. 9-1-51), and such general conditions were neither attached to nor incorporated in the prime contract. The disputes clause quoted on Page 4 of the Petition was one of the "General Provisions" of the prime contract, and such "General Provisions" were at no time incorporated by reference or otherwise into the subcontract.

Petitioners erroneously state the position of Respondents. This position has been and still is that the subcontractor by his subcontract did not agree to be bound by the disputes clause contained in the "General Provisions" of the prime contract. The position of Respondents was specifically adopted by the Court of Appeals for the Tenth Circuit in its Opinion.

Petitioners, while disclaiming any intention to discuss the merits, do so on pages 6 and 7 of the Petition. The Trial Court and the Court of Appeals for the Tenth Circuit both found for Respondents on the merits, and findings were specifically made and affirmed

that the $110,000.00 awarded Respondents covered bona fide extras which were ordered by the prime contractor. See, *e.g.*, Findings of Fact of the Court numbered 6 through 13 (R. 37-39). Petitioners' arguments on the merits are groundless in the light of the uncontested findings made by the Courts below.

REASONS FOR ALLOWANCE OF THE WRIT

Although the Court of Appeals for the Tenth Circuit carefully limited its holding to an interpretation of the two contracts involved, Petitioners carefully avoid meeting this issue in stating their reasons for allowance of the Writ. The only remotely possible reason for the allowance of a Writ in this case would be one based on an attack on the contractual interpretations made by the Courts below. This reason, however, vanishes readily when the opinion of the Court is examined in conjunction with the two contracts involved.

ARGUMENT

POINT I. THE COURT OF APPEALS FOR THE TENTH CIRCUIT DECIDED THIS CASE ON THE BASIS OF THE INTERPRETATION OF THE CONTRACTS INVOLVED, NOT ON ANY QUESTION OF EXHAUSTION OF ADMINISTRATIVE REMEDY.

Petitioners commence their first point by stating that the Miller Act was erroneously interpreted by the Court below, and then proceed to give a history and outline of the Miller Act and a lengthy historical review of defense contracts, "Dispute Clauses" and The Board of Contract Appeals. The statement with regard to the Miller Act is not true, since the Court below did not interpret the Miller Act but rather the two contracts involved in the case. The history developed by Petitioners is interesting, but completely irrelevant to any issue before this Court.

The conclusions of the Court of Appeals for the Tenth Circuit on the only true issue involved in this case before this Court are found in the following quotations from the Opinion of the Court:

> "It is contended that by these references, Section 6 of the general provisions of the prime contract was incorporated in the subcontract, and that a suit under the Miller Act cannot be maintained by the subcontractor until there is a final determination of the claims submitted under Section 6. While we express no opinion as to the right of the parties to enter into an agreement which might circumvent the Miller Act, we hold that it was not the intention of the parties to the subcontract that the subcontractor was required to comply with the provisions of Section 6 before it could maintain an action under the Miller Act." Petition, Appendix A, p. 4.

> "An agreement should not be construed to bring about such a result unless it be 'manifest by plain language' of the contract. *United States* v. *Moorman*, 338 U.S. 457, 462; *Mercantile Trust Co.* v. *Hensey*, 205 U.S. 298, 309. The language of the subcontract manifests no such intention. The subcontract references are to the 'general conditions' of the prime contract not the 'general provisions,' and they relate generally to performance of the subcontract according to the specifications, not to the settlement of disputes, or the subcontractor's right to sue under the Miller Act." Petition, Appendix A, p. 6.

Petitioners have not shown wherein either of these quotations are erroneous, or did any violence to the doctrine of the exhaustion of administrative remedies; and absent such a showing, Petitioners' first point has absolutely no merit.

POINT II. THE COURT OF APPEALS FOR THE TENTH CIRCUIT CORRECTLY INTERPRETED THE CONTRACTS INVOLVED.

Petitioners mount a two-pronged attack on the interpretation of the contracts involved made by the Court below. The first involves the use of various quotations from this Court and other authorities setting out broad rules of contractual interpretation, while the second involves the use of the doctrine that the constructions of the instrument by the parties are governing when the instrument is ambiguous. Petitioners at no point attack the true basis on which the Court below reached its decision; to-wit, that the terms "general conditions" and "general provisions" do not mean the same thing. The reason for this absence for attack, we believe, is that logically and legally the decision of the Court below is absolutely correct and cannot be attacked.

With regard to the two theories relied on by Petitioners the first, dealing with general rules of construction, fails to prove anything since the general rules are never related to the contracts in question. The second theory is based on the erroneous premise that the evidence showed that the Subcontractor Respondent took some action to be bound by the disputes clause of the prime contract. For instance, Petitioners, on page 18, state that they, meaning the contractor and the subcontractor, appealed to the Board of Contract Appeals. This is not true. The prime contractor took the appeal and the subcontractor was informed by the Board that he had no standing whatever before it. Being thus based on an erroneous premise, Petitioners' second theory must fail.

Petitioners also state that this case is essentially a dispute between the government and the subcontractor

over the performance of the paint job. This is not so for two reasons. First, the subcontractor had absolutely no contractual relationship with the government. Second, and most important, every action taken by the subcontractor was on the orders of the prime contractor, not the orders of the government; and the subcontractor at all times was looking to the prime contractor for payment. Findings of Fact of the Court (R. 37-39).

This Court has made it clear that the intention of the parties to submit their contractual disputes to final determination outside the Courts should be made manifest by plain language. *Mercantile Trust Co.* v. *Hensey*, 205 U.S. 298, 309; 51 L. ed. 811, 816 (1907); *United States* v. *Moorman*, 338 U.S. 457, 462; 94 L. ed. 256, 260 (1950). We submit that the Court of Appeals for the Tenth Circuit followed these decisions and interpreted the two contracts involved in the only permissible way in the light of the use of the words "general provisions" in the prime contract and the use of the words "general conditions" in the subcontract. Thus, Petitioners' point two is without merit.

POINT III. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT BELOW AND DECISIONS REACHED BY THE COURTS OF OTHER CIRCUITS.

Petitioners cite five cases as purportedly showing a split of authority among the circuits. These cases do no such thing. In *United States* v. *Bruce*, 272 F. 2d 62, 64 (5th Cir. 1959), the Court accepted the argument of the subcontractor that the subcontract embraced the guaranty provisions of the prime contract between the government and the prime contractor. This apparently was conceded by the prime contractor and was not an issue in the case. In *United States*

v. *George*, 243 F. 2d 83, 86 (5th Cir. 1957), again there was no apparent disagreement between the parties that the subcontract incorporated by reference all the provisions of the prime contract, including the disputes clause. In *United States* v. *Morley Construction Co.*, 98 F. 2d 781 (2nd Cir. 1938), the subcontract contained specific language incorporating the portion of the prime contract in question, and again neither party contended that such incorporation by reference did not exist. In *Ross Engineering Co.* v. *Pace*, 153 F. 2d 35, 41 (4th Cir. 1946), the Fourth Circuit was called upon to decide if a reference in the subcontract to the prime contract on a certain issue overcame a specific clause in the subcontract on the same issue. The court ruled that the specific clause governed, which is consistent, rather than inconsistent, with the opinion of the Court below in the instant case. In *United States* v. *Henke Construction Co.*, 157 F. 2d 13, 19 (8th Cir. 1946), the court stated, "The subcontract, however, was subject to the provisions of the original construction contract"; and the subcontractor apparently cited no language in the subcontract to refute this statement. It is most interesting to note that in all of the cases cited above, the Court of Appeals reached a decision under the Miller Act, and in at least one of these cases, an appeal from the decision of the contracting officer was in process. *United States* v. *Bruce, supra,* at page 65. Also, in two of the cases (*Morley Construction Co.* and *Ross Engineering Co.*) the circuit court ruled specifically that the intention of the parties to the subcontract was not to be bound by the decision of the contracting officer under the prime contract. Thus, far from setting up a conflict, these cases support the contractual interpretation made by the Tenth Circuit in the instant case.

Other cases where courts of appeal have proceeded in Miller Act cases in spite of pending appeals from the decision of the contracting officer, are *United States* v. *Williams*, 240 F. 2d 561 (10th Cir. 1957), and *John A. Johnson and Sons* v. *United States*, 153 F. 2d 534 (4th Cir. 1946). There thus being no conflict among the circuits whatever, Petitioners' point three must also fail.

CONCLUSION

This case, very simply, involves nothing more than an interpretation of the inter-relation of a subcontract with a prime contract on a government job. No conflicts among the circuits exist, no important questions of federal law exist and the decision of the Court below is in conformity with all applicable decisions of this Court. Not a single one of the reasons for granting certiorari listed in rule 19 of this Court even remotely exists. In spite of the efforts made by Petitioners to cloud and even ignore the sole basis for the decision of the Court below, that basis clearly was one of the interpretation of the subcontract. This is not the type of case taken by this Court. For all these reasons, and for the reasons stated in the body of this brief, the Petition should be denied.

Respectfully submitted,

W. A. Sloan
First National Bank Building
Albuquerque, New Mexico
Attorney for Respondents

John P. Eastham and
Rodey, Dickason, Sloan,
Akin & Robb
Albuquerque, New Mexico
Of Counsel